

**Walter Motor Truck Company and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 1152. Case 3-CA-9804**

July 1, 1981

**DECISION AND ORDER**

On April 28, 1981, Administrative Law Judge Winifred D. Morio issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions limited to apparent inadvertent failure to provide certain language in the notice.

The Board has considered the attached Decision in light of the exceptions and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, to adopt her recommended Order, and to modify the notice.<sup>1</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Walter Motor Truck Company, Voorheesville, New York, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order and that it substitute and post the attached notice for that of the Administrative Law Judge.

<sup>1</sup> The notice is modified to include language herein quoted to the effect that Respondent will not withhold sick pay benefits payable to John Chrysler for the period of April 18, 1980, "to on or about October 5, 1980."

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

**WE WILL NOT** withhold sick pay benefits payable to Thomas William Gross, for the period of April 18, 1980, to on or about August 23, 1980; to Michael Buzo, for the period of April 18, 1980, to on or about October 5, 1980; to John Chrysler, for the period of April 18, 1980, to on or about October 5, 1980, or otherwise discriminate against employees because of any union activity by any of our employees, including strikers.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

**WE WILL** pay to Thomas William Gross, Michael Buzo, and John Chrysler all moneys due to them for the period it was withheld unlawfully, together with any interest due thereon.

**WALTER MOTOR TRUCK COMPANY**

**DECISION**

**STATEMENT OF THE CASE**

WINIFRED D. MORIO, Administrative Law Judge: A charge was filed on May 22, 1980, by counsel for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 1152 (hereinafter called collectively the Union) against Walter Motor Truck Company (herein called Respondent) alleging a violation of Section 8(a)(1), (3), and (5) of the Act.<sup>1</sup> The complaint, which issued on June 24, 1980, alleged that Respondent discontinued sick pay benefits to its disabled employees, Thomas William Gross, Michael Buzo, and John Chrysler in violation of the Act.<sup>2</sup> Respondent filed an answer which admitted the discontinuance of the sick pay benefits on April 18, 1980, but denied the commission of unfair labor practices.

The case was heard before me on January 22, 1981. Respondent failed to appear at the hearing. Counsel for the General Counsel stated during the hearing that both Robert Bohn, who signed the answer and who was an executive vice president of Respondent, and Jerome McDougal, its president, told him that they would not participate in the proceedings. At my request, on the first day of the hearing, a telephone call was made to Respondent's premises. During the conversation that ensued, with a person who identified himself as a former production manager for Respondent, counsel for the General Counsel was advised that the Company was not in operation.<sup>3</sup>

Counsel for the General Counsel filed a brief in support of his position. Respondent did not file a brief.

Upon the entire record in this case and my observation of the witnesses' demeanor, and after careful consideration, I make the following:

**FINDINGS OF FACT**

**I. JURISDICTION**

Respondent, a New York corporation, with its principal office and place of business at School Road in the City of Voorheesville, State of New York, is engaged in the manufacture, sale, and distribution of specialty trucks and related parts. During the past year, Respondent in the course of its business operations manufactured, sold, and shipped from its plant at Voorheesville, New York, trucks and related parts valued in excess of \$50,000 of

<sup>1</sup> The 8(a)(5) allegation was withdrawn.

<sup>2</sup> During the hearing counsel for the General Counsel amended the complaint and withdrew the name of James J. Furstman, Jr., who had been alleged as a fourth discriminatee.

<sup>3</sup> This alleged former production manager also said that he was at the premises as a security guard for Bankers Trust.

which products valued in excess of \$50,000 were shipped from said plant directly to States of the United States other than the State of New York. I find, and Respondent admits, that it is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

The Union is, and has been at all times material herein, the recognized collective-bargaining representative of certain of Respondent's employees. I find, and Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICE

### A. Background Facts

Ernest Lawrence, an employee of Respondent and president of Local 1152, testified that the Union has been the representative of the production, maintenance, tool-room, machine shop, inspection, shipping, clerk-shop, and receiving employees of Respondent for some period of time. On April 18, 1977, the parties entered into a collective-bargaining agreement effective from April 18, 1977, to April 18, 1980.<sup>4</sup> The agreement contained provisions relating to leave of absence and payment to employees by Respondent when an employee was absent due to illness. These provisions are set forth in article XI, sections 2 and 5(a) through (e). They provide as follows:

#### ARTICLE XI LEAVE OF ABSENCE

Section 2. A sick leave of absence will be granted to an employee upon request. If it develops that the leave of absence is to be for an extended period of time, the Company will require an appropriate doctor's statement. Duration of a sick leave of absence will be limited to one year, but may be extended up to a maximum of three (3) years if, upon receipt of a request from the Company to the employee sent certified mail (return receipt requested), the employee states that he desires to return to the Company, and also submits a physician's statement that an expected improvement in his condition will enable him eventually to return.

Section 5. All employees who have completed at least one year of service with the Company will be paid for absence due to illness in accordance with the following schedule:

- a. Absence due to illness, first five (5) working days . . . no compensation.
- b. From the sixth (6th) working day up to a maximum of two (2) calendar years, the employee will receive compensation equal to the difference between the Statutory New York State Disability Benefits or Workmen's Compensation in lieu of pay, and his regular rate of pay, computed on the

basis of the existing established work week and his regular rate of pay.

- c. An employee who is not eligible for New York State Disability Benefits or Workmen's Compensation in lieu of pay will receive full pay from the sixth (6th) calendar day up to a maximum of two (2) calendar years.

In March 1980, the parties commenced negotiations for a collective-bargaining agreement to succeed the contract ending on April 18, 1980. During these negotiations, the Union proposed that the benefits under the sick leave provisions be increased. Respondent rejected this proposal and insisted that the benefits remain the same as they were in the 1977-80 contract. On April 17, 1980, the Union withdrew its request for additional benefits and the parties agreed that the sick pay benefits would remain the same. Although agreement on many terms for a contract had been reached by April 18, 1980, the Union commenced a strike on April 19, 1980, because agreement had not been reached on the wage provisions. This strike continued through to sometime in November 1980 when the Union terminated it. During the period between April 1980 and September 1980, the parties met once or twice and at these meetings Respondent's representative discussed the financial difficulties of the Company. In September 1980, Lawrence, the Union's representative, received a phone call from McDougal, Respondent's president, during which McDougal stated that the Company expected to receive financial assistance in the form of loans and he anticipated that the Company would be able to commence operations.<sup>5</sup> During the phone calls, Lawrence suggested that the parties meet for further negotiations; McDougal agreed to this proposal and a meeting was held on October 1, 1980. At this meeting, the parties allegedly agreed verbally on an entire contract for the period April 1980 to April 1983.<sup>6</sup> However, notwithstanding this alleged agreement, Respondent's representative refused to execute the document until the Company started full operations. The unexecuted document contains an article XI which is identical to the article XI in the 1977-80 contract. In addition to this unexecuted document, the parties entered into a memorandum of understanding which was executed on October 1, 1980, by Lawrence and other union representatives and by Leonard Tozer, Respondent's vice president, and Bruce Court, its personnel manager.<sup>7</sup> This document does not directly cite article XI. It states in pertinent part the following:

Those on sick leave will be recalled. Should they be determined to be unable to work they would be reinstated under the sick leave policy.

In addition this memorandum of understanding contains this language:

<sup>5</sup> Lawrence testified that during the period between April and September 1980 Respondent's plant was not operating at full capacity because of the strike but the plant was producing various machine parts.

<sup>6</sup> G.C. Exh. 3A. This document was prepared by Respondent's attorney apparently before the strike started.

<sup>7</sup> G.C. Exh. 3B.

<sup>4</sup> G.C. Exh. 2.

- (a) With the exception of items (1), (2), and (8) above, all provisions of this memorandum cover special requirements of resuming work. Once fulfilled, normal contract provisions supersede.

It further states that the memorandum was subject to resumption of operations and membership ratification. According to Lawrence, the unexecuted document was the document controlling terms and conditions of employment and the memorandum of understanding was entered into to provide for the unusual conditions which would exist on the immediate reopening of the plant. This memorandum was to terminate at the end of a 60-day period after the reopening of the plant.

#### B. The Alleged Discriminatees

On April 19, 1980, at the start of the strike, three individuals were absent due to illness. All of these individuals had been incapacitated for some time prior to the strike, a fact known to Respondent and Respondent had been paying them sick pay benefits.

Thomas William Gross, a member of Local 1152, began his employment with Respondent as a drill operator about September 1973. In February 1980, he injured his shoulder, notified Respondent of this fact, and started receiving sick pay benefits on February 15, 1980, and continued to receive them until April 25, 1980.<sup>8</sup> Gross was unable to work due to his illness until on or about August 23, 1980, at which time he commenced picketing in support of the strike. During the period between April 1980 and August 23, 1980, Gross went to Respondent's premises on only two occasions to pick up tools. He did not participate in the strike or receive strike benefits until about August 23, 1980, at which time he began picketing. He continued picketing until some time prior to Thanksgiving, when the strike was terminated by the Union. Gross did not work at any other job between April 18, 1980, and August 23, 1980.

Michael Buzo, a member of Local 1152, began his employment with Respondent, as a painter, about October 1969. He sustained a spine injury at work on or about October 7, 1979, and received sick pay benefits from Respondent every Friday thereafter until April 25, 1980. Buzo did not participate in the strike, did not receive strike benefits, and did not go to Respondent's premises at anytime. Buzo was not employed at any other job during this period.

John Chrysler was elected as shop steward for Local 1152 in June 1978 for a term ending in June 1981. He began his employment with Respondent, as a layup person, about January 1969. On April 14, 1979, and continuing thereafter, he was absent from work due to rheumatoid arthritis. Chrysler began receiving sick pay benefits from Respondent about 2 weeks after April 14, 1979, and continued to receive them every week thereafter until April 25, 1980. Although Chrysler was at the Union's office several times a week while the strike was in progress, there is no evidence that he engaged in picketing, or performed any other duties for the Union from

the start of the strike until on or about October 14, 1980. He did not receive strike benefits until October 14, 1980, when he began picketing. There is no evidence that he was employed at any other job during this time.

#### C. Issues

Whether the sick pay provisions set forth in article XI, sections 2 and 5(a) through (e), in the 1977-80 collective-bargaining agreement continued after the expiration of that agreement.

Whether an inference is warranted that the admitted failure by Respondent to continue the payment of sick pay benefits to its disabled employees Gross, Buzo, and Chrysler was caused by the participation of other employees in the strike.

Whether Gross, Buzo, and Chrysler engaged in picketing on or after April 19, 1980, or engaged in any conduct which showed public support for the strike and thus permitted Respondent to discontinue the payment of the sick pay benefits.

#### D. Analysis

The collective-bargaining agreement in existence between Respondent and the Union prior to its expiration on April 18, 1980, provided that Respondent would make monetary payments to employees who were absent due to illness and had prior thereto completed at least 1 year of service with the Company. There were efforts by the Union during the prestrike negotiation to increase those benefits in any new contract. These efforts were unsuccessful and on April 17, 1980, the Union agreed to Respondent's proposal that these benefits would remain the same in any subsequent contract. The negotiations which took place on or about October 1, 1980, did not change this agreement. Although counsel for the General Counsel, in his brief, appears to contend that a new agreement was reached between the parties on October 1, 1980, it is noted that during the hearing he stated that he did not rely on the unexecuted document<sup>9</sup> to support his position that article XI, sections 2 and 5(a) through (e), continued as a term and condition of employment. Rather, it was his position that the unexecuted document was offered to demonstrate that the parties intended that the particular article would remain the same in any new agreement. Based on this record, I do not find that the parties entered into a new contract on October 1, 1980. In this connection, the record establishes that Respondent refused to execute the document or abide by its terms until the plant was in full operation. In addition, although not entirely clear, it appears that ratification by the union membership also was necessary before any new agreement would become effective.

Therefore, in the circumstances existing herein, it is concluded that the provisions of article XI, sections 2 and 5(a) through (3), continued unchanged notwithstanding the negotiations that occurred prior to the strike and those that took place subsequent thereto.<sup>10</sup> Further,

<sup>8</sup> G.C. Exh. 3A.

<sup>10</sup> Assuming *arguendo* that a new contract was reached on October 1, 1980, it would not change Respondent's responsibility for the period

*Continued*

<sup>8</sup> All three employees explained that the last check received was dated April 25, 1980, but it was for the week prior thereto.

based on established Board law, I find that the provisions contained in article XI, sections 2 and 5(a) through (e), relate to terms and conditions of employment and as such survive the expiration of the 1977-80 collective-bargaining agreement.<sup>11</sup>

In *E. L. Wiegand Division, Emerson Electric Co.*, 246 NLRB 1143 (1979), the Board considered the issue of whether an employer violated Section 8(a)(1) and (3) of the Act when it terminated certain sick benefits to employees who were physically unable to work because other employees of the Company went out on strike. The Board, in examining this issue, reconsidered its earlier decision in *Southwestern Electric Power Company*, 216 NLRB 522 (1975), and adopted the viewpoint as set forth by Member Fanning in his dissent. In that case, Member Fanning argued that the matter involved a Section 7 right and that employees on sick leave should not be required to state their position with respect to a strike. Thus the Board in *Wiegand* stated:

Consequently, an employer may no longer require its disabled employees to disavow strike action during their sick leave in order to receive disability benefits. To allow the termination of such benefits to certain employees as a result solely of the strike activities of others is to penalize the employees who have not yet acted in support of the strike.

However, the Board in *Wiegand* also stated the following:

However, while disabled employees need not affirmatively disavow the strike action, neither can they participate in the strike without running the risk of forfeiting benefits prospectively.

The Board, in balancing the rights of the disabled employees and those of the employer, concluded that an employer could terminate sick pay benefits to disabled employees at the start of the strike only if it could establish that it had information that the employees whose benefits it sought to discontinue had demonstrated public support for the strike.

In the instant case the record establishes that Gross, Buzo, and Chrysler were on disability leave prior to the start of the strike and further establishes that they had been receiving sick pay benefits for sometime prior thereto. It also is undisputed that at the commencement of the strike Respondent immediately ceased these payments to its disabled employees without notification or explanation. The facts in *Wiegand* differ in two respects from those existing in the instant case. In *Wiegand* the employer announced prior to the start of the strike that it would discontinue the payments because of the strike and the Union notified the employer that the disabled employees were not participating in the strike. I do not

find that these differences are sufficient to warrant a conclusion contrary to the holding in *Wiegand*.

Although Respondent herein did not specifically announce the discontinuance of the sick pay benefits, it is a fact that these benefits ceased at the start of the strike. The Board, in numerous cases, has held that direct evidence of a discriminatory motivation is not necessary to support a finding of discrimination and such intent may be inferred from the record as a whole.<sup>12</sup> In the circumstances of this case, i.e., the fact that Gross, Buzo, and Chrysler were on disability for some time prior to the strike, that Respondent was aware of this and paid them disability benefits until April 18, 1980, when the strike began, and that immediately at the start of the strike Respondent discontinued the payments and has failed to explain its discontinuance of the sick pay benefits, warrants the inference, and I so find, that these sick pay benefits were discontinued because of the strike. Furthermore, the thrust of the Board's Decision in *Wiegand* was that employees need not notify the employer that they are exercising their rights under Section 7 of the Act.

With respect to the issue of public support, Respondent has failed to establish that it had obtained knowledge that Gross, Buzo, and Chrysler had "affirmatively acted to show public support for the strike." Buzo was never at Respondent's premises, nor does the record establish that he engaged in any activity on behalf of the strike. Gross was at the premises twice to collect tools but not until August 23, 1980, did he begin picketing. Chrysler's mere presence at the union office before October 14, 1980, is not the type of public support contemplated by the *Wiegand* Decision. In that case, the disabled employees either engaged in picketing or answered telephones for the union. Furthermore, there is no evidence that Respondent was aware of Chrysler's presence at the union office and acted because of it. Accordingly, I find that Buzo, Gross, and Chrysler did not engage in any public conduct which could be considered supportive of the strike. Further, I find that Respondent has failed to establish that it had information that these disabled employees did engage in public conduct in support of the strike and that it discontinued the payment of sick pay benefits because of such conduct.<sup>13</sup>

In sum, I find that by its discontinuance of the sick pay benefits to Thomas William Gross, Michael Buzo, and John Chrysler, Respondent violated Section 8(a)(1) and (3) of the Act.

#### IV. THE REMEDY

It having been found that the Respondent unlawfully withheld sick pay benefits to Thomas William Gross, Michael Buzo, and John Chrysler it is ordered, in remedy, to pay them the moneys due to them, with interest.

April 19, 1980, through October 1, 1980. Nor would it affect its responsibility thereafter in view of the fact that the alleged new contract contained the same sick pay provisions as those set forth in the 1977-80 contract.

<sup>11</sup> *Harold W. Hinson d/b/a Hen House Market, No. 3*, 175 NLRB 596 (1969), enf'd. 428 F.2d 133 (8th Cir. 1970); *SAC Construction Company*, 235 NLRB 1211, 1218 (1978), enforcement denied on other grounds 603 F.2d 1155 (5th Cir. 1979).

<sup>12</sup> *Health International Inc.*, 196 NLRB 318 (1972); *Irwin County Electric Membership Cooperative*, 247 NLRB 1357 (1980); *Bill Johnson's Restaurants Inc.*, 249 NLRB 155, 160 (1980).

<sup>13</sup> There was some indication that Respondent has some financial problems. However, nothing contained in this record warrants the conclusion that the failure to continue to pay the sick pay benefits was due to such difficulties.

#### V. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set out in section III, above, occurring in connection with its operations described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### CONCLUSIONS OF LAW

1. By withholding sick pay benefits to the employees named in the complaint herein, Respondent has engaged in, and is engaging in, unfair labor practices within meaning of Section 8(a)(1) and (3) of the Act.

2. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>14</sup>

The Respondent, Walter Motor Truck Company, Voorheesville, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Withholding payment of sick pay benefits from employees for the purpose of coercing them or other employees in the exercise of their rights to engage in protected concerted activities, including strike.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Make whole Thomas William Gross by paying him the sick pay benefits due to him during the period from April 18, 1980, to on or about August 23, 1980.

(b) Make whole Michael Buzo by paying him the sick pay benefits due to him during the period from April 18, 1980, to on or about October 5, 1980.

(c) Make whole John Chrysler by paying him the sick pay benefits due to him during the period from April 18, 1980, to on or about October 5, 1980.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(e) Post at its place of business in Voorheesville, New York, copies of the attached notice marked "Appendix."<sup>15</sup> Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by its authorized representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 3, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

<sup>14</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>15</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."